

**FILED**

**JUN 13 2003**

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN LOPEZ-PEREZ,

Defendant - Appellant.

No. 02-10400

D.C. No. CR-01-00357-DCB

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
David C. Bury, District Judge, Presiding

Submitted June 10, 2003\*\*  
San Francisco, California

Before: T.G. NELSON, HAWKINS, Circuit Judges, and ZILLY,\*\*\* District  
Judge.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

Juan Lopez-Perez was indicted and convicted of illegal reentry after removal. He appeals the district court's denial of his motion to dismiss the indictment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Because the parties are familiar with the facts, we do not recite them here. We conclude that Lopez-Perez's waiver, at the underlying removal hearing, was not knowing and intelligent. The immigration judge ("IJ") erroneously failed to inform Lopez-Perez of the possibility that he might have a claim for derivative citizenship.<sup>1</sup> A "reasonable possibility" existed that Lopez-Perez had such a claim, based on the conflicting record before the IJ.<sup>2</sup> We reject Lopez-Perez's argument regarding the right to obtain an attorney because he did not raise it before the district court.<sup>3</sup>

Although we conclude that Lopez-Perez's waiver was not knowing and intelligent, and a due process violation therefore occurred,<sup>4</sup> we nonetheless affirm

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<sup>1</sup> *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001).

<sup>2</sup> *See id.*

<sup>3</sup> *See Ariz. v. Components, Inc.*, 66 F.3d 213, 217 (9th Cir. 1995). In any event, the argument has no merit, as Lopez-Perez told the IJ he was prepared to proceed without an attorney after several continuances.

<sup>4</sup> *Muro-Inclan*, 249 F.3d at 1183–84.

because Lopez-Perez has not shown prejudice from the violation.<sup>5</sup> Indeed, although counsel in Lopez-Perez’s criminal case conducted an investigation, Lopez-Perez introduced nothing to support his claim. He simply rests on his assertion that his father was born in California. Given that, aside from Lopez-Perez’s unsubstantiated assertion, the record supports the opposite conclusion, we find that Lopez-Perez has shown no plausible ground for relief and cannot show prejudice.<sup>6</sup>

The district court may rely on evidence that was inadmissible at Lopez-Perez’s removal proceeding before the IJ.<sup>7</sup> Accordingly, the district court did not err in consulting the evidence in the record.

For the foregoing reasons, we affirm.

AFFIRMED.

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<sup>5</sup> *Id.* at 1184 (stating that, to show prejudice, a petitioner must demonstrate that “he had a ‘plausible’ ground for relief from deportation,” not merely a ground about which the IJ should have informed him) (some internal quotation marks omitted).

<sup>6</sup> *See id.* at 1185–86.

<sup>7</sup> *See United States v. Arrieta*, 224 F.3d 1076, 1082–83 (9th Cir. 2000) (finding prejudice after consulting evidence not presented to the IJ).